Supreme Court, U.S.
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In the
Supreme Court of the United States

ILLINOIS,

Petitioner,

vs.

AARON D. SWIFT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which invalidated the procedure used to impose a mandatory enhancement, should be distinguished from a procedure for judicially imposing a discretionary extended term, because the language and reasoning in *Apprendi* are directed at sentencing statutes that serve to create additional elements of an offense.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully requests that this Court issue a writ of *certiorari* to the Supreme Court of Illinois to review that court's judgment and opinion entered on November 21, 2002.

OPINIONS BELOW

The Supreme Court of Illinois, on November 21, 2002, issued a published opinion in this case, *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002). This decision is reprinted in the appendix to this petition. The May 22, 2001, published opinion of the Illinois Appellate Court is also reprinted in the appendix to this petition. *People v. Swift*, 322 Ill.App.3d 127, 750 N.E.2d 294 (2nd Dist. 2001).

JURISDICTION

The Supreme Court of Illinois entered its opinion on November 21, 2002. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a), since, in the proceedings in the state courts of Illinois, Respondent asserted an alleged violation of his rights arising under the United States Constitution.

STATEMENT OF THE CASE

The respondent, Aaron Swift, was charged by indictment with committing the offense of first degree murder for the stabbing death of 19 year old Karzell Anderson. The murder stemmed from a failed drug transaction, and took place over several hours on February 19, 1998. At one point the respondent promised his sister that he would get help for the victim, but instead cut his throat so he could not tell people at the hospital who had injured him.

The respondent was tried by a jury, and he was found guilty. The trial court sentenced him to an extended term of 80 years, finding the offense to be brutal and heinous, indicative of wanton cruelty. The Appellate Court of Illinois, Second District, affirmed the jury's verdict, but vacated the extended term sentence because it found Section 5-8-2 of the Illinois Code of Corrections to be unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Swift*, 322 Ill.App.3d 127, 750 N.E.2d 294 (2d Dist. 2001). (App. at 15).[1] The Petitioner appealed to the Supreme Court of Illinois, which affirmed in part and vacated in part. *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002). (App. at 1). Specifically, the supreme court disagreed with the appellate court's determination that the statute was facially unconstitutional. (App. at 14). The court found the procedure used to impose the extended term to be invalid, however, because the trial court made the determination at sentencing rather than submitting the aggravating factor to the jury for a finding based on proof beyond a reasonable doubt. (App. at 2-6, 13-14). The state supreme court concluded that the extended term provision took the sentence beyond the statutory range, and that, "According to *Apprendi*, any factual findings which take a

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[1] "App." refers to the Appendix attached to this petition.

sentence above the sentencing range must be proven to a jury beyond a reasonable doubt." (App. at 14).

Petitioner, the People of the State of Illinois, now seeks a writ of *certiorari* from this Court to review the judgment and opinion of the Supreme Court of Illinois.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Supreme Court Of Illinois Misconstrued *Apprendi v. New Jersey*, 530 U.S. 466 (2000), As Requiring The Submission Of A Discretionary Extended Term Sentencing Factor To A Jury, Though The Discretionary Factor Did Not Act As An Element Of The Offense As Had The Mandatory Factor At Issue In *Apprendi*.

The respondent was charged by indictment with first-degree murder. He was found guilty by a jury, and the trial court imposed an extended term sentence of 80 years in the Department of Corrections. The Supreme Court of Illinois vacated the extended term based on its determination that the procedure used to find the sentencing factor is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). *People v. Swift*, 202 Ill.2d 378, 781 N.E.2d 292 (2002) (App. at 2-6, 13-14). The Petitioner now asks this Court to grant *certiorari* and reverse the court's determination, because the extended term statute does not offend this Court's reasoning in *Apprendi*.

In *Apprendi*, this Court considered a New Jersey procedure requiring the trial judge to impose an extended term sentence upon finding, by a preponderance of the evidence, that the defendant, when committing the offense for which he was being sentenced, had acted with a racially biased purpose. N.J.Stat. §2C; 44-3. The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum[2] must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. This holding is based on the concern that "the effect of New Jersey's sentencing 'enhancement' here is unquestionably to turn a second degree offense into a first degree offense under the State's own criminal code." *Apprendi*, 530 U.S. at 494. Both the nature of the statute and this Court's analysis thus appear to support the inference that the opinion addressed the situation actually before the Court, and that the statute at issue here does not offend that reasoning.

The extended term provisions in Illinois do not work in the same manner as the statute found to be unconstitutional in *Apprendi*. Unlike the New Jersey provision, where an enhanced sentence was required if the crime was shown to be a hate crime, the Illinois sentencing scheme at issue leaves the sentencing judge the discretion not to give an extended term sentence even if one of the triggering factors in section 5-5-3.2 is found to exist. "Where the judge finds that such factors [from section 5-5-3.2] were present, he may sentence an offender to the following: first-degree murder, a term shall not be less than 60 years and not more than 100 years." 730 ILCS 5/5-8-2(a)(1) (emphasis added). The presence of such discretion to select a non-extended term sentence despite proof of the presence of an aggravating factor takes Illinois' sentencing scheme outside of the coverage of *Apprendi*.

Additionally, extended term factors do not augment the offense class for sentencing purposes, as does the recidivist provision in Section 5/5-5-3(c)(8), for instance, which provides for Class X sentencing for certain offenders convicted of Class 1 or Class 2 felonies. 730 ILCS 5/5-5-3(c)(8). Nor do

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[2] The Supreme Court of Illinois determined that the statutory maximum for first degree murder is 60 years. *Swift*, 202 Ill.2d at 385-392 (App. at 6-13).

the factors operate like specific aggravating factors within the Criminal Code, which are clearly viewed as elements of enhanced crimes that create greater class offenses. Intentionally or knowingly causing great bodily harm elevates battery, a misdemeanor, to aggravated battery, a Class 3 felony. 720 ILCS 5/12-3(b); 720 ILCS 5/12-4(a) and (e). Confining or restraining the victim raises stalking, a Class 4 felony, to aggravated stalking, a Class 3 felony. 720 ILCS 5/12-7.3(b); 720 ILCS 5/12-7.4(a)(2) and (b). Similarly, the display of a dangerous weapon, other than a firearm, takes criminal sexual assault, a Class 1 felony, to aggravated criminal sexual assault, a Class X felony. 720 ILCS 5/12-13(b)(1); 720 ILCS 5/12-14(a)(1) and (d)(1).

In these situations, once the finder of fact enters a verdict on the higher class offense, the sentencing judge has no discretion to impose a sentence based on the lower class sentencing range. As in *Apprendi*, the presence of the aggravating factor requires imposition of a sentence at the higher range. In contrast, the aggravating factor here did not require the judge to impose an extended term. The judge's discretion distinguishes the sentencing scheme at issue from the provision considered in *Apprendi*.

The Supreme Court of Illinois recognized the differences between the statutes, but concluded that this Court's analysis did not rely on these distinctions, and so the "distinctions make no difference." (App. at 4). The problem with this conclusion is that it divorces this Court's reasoning from the case actually before it in *Apprendi*. Such a severance cannot be proper, since it would render *Apprendi* little more than an advisory opinion.

This Court again considered "the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence" in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 2409-2410 (2002). In *Harris*, both the majority and dissent seriously considered what

actually constitutes a crime, but a good explanation is provided early in the lead opinion: "Legislatures define crimes in terms of the facts that are their essential elements." *Id.* That being the case, a discretionary sentencing factor would seem not to constitute an "essential element," since its proof does not require additional punishment. As this Court continued:

> . . . not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

Harris, 536 U.S. at ___, 122 S.Ct. at 2410. Again, the factor at issue neither raises the class of the offense nor requires imposition of greater punishment. Therefore, it should not constitute an element of the underlying felony. Since such a factor does not constitute an element, the right to a jury trial is not compromised by judicial determination of the presence of the factor within the surrounding circumstances of the offense.

In making this argument, Petitioner recognizes this Court's directive that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. The effect here remains the court's discretion to find the factor proven but the extended sentence unwarranted.

Petitioner is also mindful of this Court's concern that a sentencing scheme that provides for judicial determination of facts that "expose" defendants to greater punishment may raise serious constitutional issues. *Apprendi*, 530 U.S. 486, discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88, 106 S.Ct. 2411 (1986). Despite this Court's concern, mere "exposure" to greater punishment cannot be the answer to the question, because exposure alone does not lead to the conclusion that the legislature found the factors sufficiently significant to the actual offense to fit within "the facts that are [the crime's] essential elements." *Harris*, 536 U.S. at ___, 122 S.Ct. at 2409-2410. The Supreme Court of Illinois erred in finding this distinction meaningless, (App. at 4), because it goes to the heart of the question grappled with in *Apprendi* and *Harris*: what are the true components of a crime, the elements that trigger the Constitution's jury trial protections? The hate crime factor in *Apprendi* constitutes such an essential element, not because it opens the door to the possibility of greater punishment, but because its presence absolutely requires greater punishment. In contrast, the factor at issue here, brutal and heinous behavior indicative of wanton cruelty, does not absolutely require the imposition of the available extended term. Instead, even when the factor is proven, the sentencing judge retains the discretion whether to impose the extended term sentence or to impose a sentence within the lower range. Again, this discretion takes this factor outside the essential elements of first degree murder.

Finally, perhaps the most important policy reason that supports the position that the Illinois statute does not violate *Apprendi* is the longstanding tradition that the States have the right to define the elements of their own offenses. *See McMillan v. Pennsylvania*, 477 U.S. at 85, discussed in *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting). Implicit within that right is the legislature's authority to distinguish between factors so significant that they

are defined as elements and raise the class of the felony, and factors sufficiently significant that they may increase possible punishment, but not so crucial that they raise the class of felony, nor, based on the surrounding circumstances, that their proof requires extended punishment. This Court alludes to this concern in responding to a point raised in the dissent. *See Apprendi*, 530 U.S. at 490 n.16. In discussing the exercise of mitigation to lower a sentence, the Court illustrates the difference between an element and a sentencing factor by considering a defendant whose status as a war veteran could be mitigating. *Id.* If an element of an offense is proven, however, mitigation cannot be used to lower the class of felony, and a defendant must be sentenced to at least the minimum term for that class felony. In contrast, if a sentencing factor is established under the extended term provision, the legislature gives the trial court the discretion to rely on mitigation in not imposing an extended term sentence. This is a distinction that should be drawn by state legislatures.

The Petitioner thus asks this Court to grant certiorari in order to show that *Apprendi*'s reasoning is properly limited to the type of mandatory enhancement that was at issue there, and to capital factors like that at issue in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).

CONCLUSION

For the aforementioned reasons, Petitioner, the People of the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari* and reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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App. 1

[Filed November 21, 2002]

Docket No. 91840-Agenda 13-September 2002.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v. AARON D. SWIFT, Appellee.

Justice FREEMAN delivered the opinion of the court:

In this appeal we are asked to review the constitutionality of defendant's 80-year extended-term sentence in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The central issue is one of construction of the Illinois sentencing statutes that establish the penalties for first degree murder. Specifically, we must determine, for purposes of *Apprendi* analysis, whether the Illinois "sentencing range" for that crime is 20 to 60 years' imprisonment, 20 years' to life imprisonment, or 20 years' imprisonment to death. We conclude that the sentencing range is 20 to 60 years' imprisonment. Because defendant's sentence exceeded this range, based on a factual finding made by the court, the sentence cannot stand. Accordingly, we vacate the sentence and remand the cause for resentencing.

BACKGROUND

In the circuit court of Winnebago County, a jury convicted defendant, Aaron Swift, of the first degree murder (720 ILCS 5/9-1(a)(2) (West 1998)) of Karzell Anderson. Although a detailed recitation of the facts underlying the conviction is not necessary for our disposition of the case, we note that from the evidence and testimony adduced at trial, the jury could have found that in February 1998, defendant stabbed the victim 21 times, causing his death, as the end result of a drug-related altercation.

The State did not seek the death penalty for defendant. However, the State did request the court to impose an ex-

tended-term sentence. The court found that the offense was exceptionally brutal or heinous, and imposed an extended term sentence of 80 years' imprisonment based on that finding. See 730 ILCS 5/5-8-2(a), 5-5-3.2(b)(2) (West 1998). Defendant appealed.

The appellate court affirmed defendant's conviction, but vacated his extended-term sentence. In so doing, the court held that section 5-8-2 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2 (West 1998))—the statute authorizing the extended-term sentence the circuit court imposed on defendant—was unconstitutional under *Apprendi*, which was decided while the appeal was pending. 322 Ill.App.3d 127. This appeal of right followed. 177 Ill.2d R. 612(b); 134 Ill.2d R. 317. For the reasons that follow, we affirm the judgment of the appellate court that the sentence imposed in this case cannot stand and remand for resentencing.

ANALYSIS

As previously noted, this case involves application of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). There, the defendant was convicted of possession of a firearm for an unlawful purpose, a "second-degree" offense (N.J.Stat.Ann. § 2C:39-4(a) (West 1995)) normally punishable by a sentence of 5 to 10 years' imprisonment (N.J.Stat.Ann. § 2C:43-6(a)(2) (West 1995)). However, a New Jersey "hate crime" statute increased the applicable sentence to 10 to 20 years' imprisonment, based on the trial judge's finding, by a preponderance of the evidence, regarding the defendant's motive for committing the crime. N.J.Stat.Ann. § 2C:43- 7(a)(3) (West 1995). The high court struck down the latter statute, framing the issue as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by

a jury on the basis of proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 469, 120 S.Ct. at 2351, 147 L.Ed.2d at 442. The Court answered this question in the affirmative, concluding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63, 147 L.Ed. 2d at 455.

Defendant argues that *Apprendi* compels vacatur of his sentence in the instant case. He contends that based solely on the facts found by the jury, he was only exposed to a sentence of between 20 and 60 years' imprisonment for his conviction of first degree murder. See 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). He notes that his 80-year extended-term sentence, like the sentence imposed in *Apprendi*, was based on a factual finding by the trial judge by a preponderance of the evidence. See 730 ILCS 5/5-8-2(a), 5-5-3.2(b)(2) (West 1998). He argues that a straightforward application of *Apprendi* requires that his extended-term sentence be vacated and the cause remanded for resentencing.

The State disagrees. First, the State attempts to distinguish *Apprendi* on its facts, arguing that the Court never intended that sentences imposed under statutes such as the Illinois extended-term statute be judged according to the rule announced in *Apprendi*. In the alternative, the State contends that the statutory scheme in force in Illinois and the sentence imposed on the defendant in the instant case do not violate the *Apprendi* rule. We shall consider these arguments in turn.

Initially, the State attempts to limit *Apprendi* to its facts, proffering two distinctions between the New Jersey statute struck down in *Apprendi* and the extended-term statute under which defendant was sentenced in the instant case. First, the State notes that the statute at issue in *Apprendi*

required the court to impose a longer sentence upon the requisite factual finding concerning the defendant's motive, whereas the Illinois extended-term statute merely permits the court to impose an extended-term sentence upon an appropriate finding. See 730 ILCS 5/5-8-2(a) (West 1998). Second, the State notes that in *Apprendi* the Court stated that the New Jersey statute essentially raised the classification of the underlying offense, from a second-degree offense to a first-degree offense. See *Apprendi*, 530 U.S. at 494, 120 S.Ct. at 2365, 147 L.Ed.2d at 457. The State contends that the Court was only truly concerned with statutes which changed offense classifications and argues that the rule announced in *Apprendi* was never intended to apply to statutes that do not have such an effect.

Neither distinction is persuasive. Although the State correctly characterizes the statute at issue in *Apprendi*, the Court's analysis did not rely on the features by which the State seeks to distinguish the case. In other words, the State's distinctions make no difference.

As we have previously discussed, the rule established by the Court's decision in *Apprendi* admits of a relatively simple statement: Due process requires that all facts necessary to establish the statutory sentencing range within which the defendant's sentence falls must be proven to a jury beyond a reasonable doubt. See *People v. Jackson*, 199 Ill.2d 286, 296 (2002); *People v. Ford*, 198 Ill.2d 68, 73 (2001), quoting *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63, 147 L.Ed.2d at 455. With respect to the State's first argument, the mandatory nature of the New Jersey sentence increase was not germane to the Court's analysis, as is evident in the Court's framing of the issue—"whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a

reasonable doubt." (Emphasis added.) *Apprendi*, 530 U.S. at 469, 120 S.Ct. at 2351, 147 L.Ed.2d at 442. The Court did not rely on this feature of the statute in any portion of its analysis. A defendant's due process rights are violated by a sentence which exceeds the maximum sentence authorized by the facts found by the jury, whether imposition of the invalid sentence is mandatory or discretionary with the judge.

The State's second basis for distinguishing *Apprendi* is that the rule was only intended to apply to statutes which actually change the classification of the offense. This argument fares little better than the State's first argument, in light of the Supreme Court's recent decision *Ring v. Arizona*, 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). There, the Court held that the Arizona death penalty scheme did not pass constitutional muster, because it allowed the judge to make a factual finding which would determine whether a defendant convicted of first degree murder would receive the death penalty or life imprisonment. The statute which the Court invalidated in *Ring* did not change the classification of the offense.

The State's attempts to distinguish *Apprendi* on its facts are unavailing. Accordingly, we must proceed to the central issue in the case, analysis of the penalty scheme for first degree murder in Illinois. We note that this case squarely presents this court with an issue we previously left unaddressed. See *Ford*, 198 Ill.2d at 73.

The central tenet of *Apprendi* is that the constitution requires that any facts necessary to authorize the sentence imposed on the defendant must be proven to the jury, beyond a reasonable doubt. In this case defendant was sentenced to 80 years' imprisonment based on a factual finding that the crime was brutal and heinous. This finding was made by the circuit court judge, not a jury. Moreover, the burden of proof was merely a preponderance of the

evidence, not proof beyond a reasonable doubt. See *People v. Jackson*, 199 Ill.2d 286, 293 (2002) (judge need only find extended-term sentencing factor by a preponderance of the evidence). Accordingly, defendant's sentence cannot stand unless he was eligible for such a sentence without such a finding—*i.e.*, based solely on the facts found by the jury beyond a reasonable doubt. As previously noted, defendant argues that the appellate court correctly vacated his sentence, because the sentencing range for first degree murder is 20 to 60 years' imprisonment.

The State contends that according to the statutes which establish the sentencing structure for first degree murder, defendant became eligible for a sentence of 20 years to life—or 20 years to death—upon the jury's finding that he was guilty of first degree murder, because there is statutory authorization for any sentence in these ranges. The State urges that it is of no moment that the judge made a factual finding in the course of sentencing defendant, because defendant's sentence fell within the sentencing range for the crime of which the jury found him guilty. Accordingly, the State argues, the appellate court erred, and defendant's 80-year sentence should be affirmed.

We must determine what sentence could be imposed on defendant for his first degree murder conviction, based solely on the facts found by the jury. This is a question of statutory interpretation, and as such the principles guiding our analysis are well established. In matters of statutory interpretation our standard of review is *de novo*. Our primary purpose is to give effect to the intent of the legislature, and the best evidence of that intent is the plain language of the statutes. Where the meaning of a statute is plain on its face, there is no need to resort to other tools of construction. In interpreting statutes, we must avoid constructions which would produce absurd results. *People v. Pullen*, 192 Ill.2d 36, 42 (2000).

There are three statutes involved.

Section 5-8-1(a)(1) of the Code (730 ILCS 5/5-8-1(a)(1) (West 1998)) provides that "[e]xcept as otherwise provided in the statute defining the offense," the court shall impose a sentence of imprisonment for first degree murder within certain constraints:

> "(a) a term shall be not less than 20 years and not more than 60 years, or
>
> (b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, except as set forth in subsection (a)(1)(c) of this Section, that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment, or
>
> (c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if [various factual predicates obtain with respect to the defendant, the victim, or the crime.]" 730 ILCS 5/5-8-1(a)(1)(a) through (a)(1)(c) (West 1998).[1]

Section 9-1 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1 (West 1998)) defines the crime of first degree murder and sets out the procedures necessary to impose the death penalty for the crime. Subsection (a) of section 9-1 provides that one who kills an individual with-

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[1] While this case was pending on appeal, the legislature amended subsection (a)(1)(b) so as to require "a trier of fact" to make the requisite factual finding "beyond a reasonable doubt" before allowing imposition of a sentence of natural life imprisonment. Pub. Act 91-953, § 10, eff. February 23, 2001.

out lawful justification commits first degree murder if, in performing the acts which cause the death,

> "(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a) (West 1998).

Subsection (b) of section 9-1 provides that a defendant found guilty of first degree murder who was 18 or older at the time of the commission of the offense may be sentenced to death if one of several different aggravating factors obtain. See 720 ILCS 5/9-1(b)(1) through (b)(19) (West 1998). Before a death sentence may be imposed, however, the court must hold a separate sentencing hearing. 720 ILCS 5/9-1(d) (West 1998). At this hearing, a jury—or the court, if defendant waives a jury—must first determine whether the State has proven one or more of the enumerated aggravating factors beyond a reasonable doubt. 720 ILCS 5/9-1(g), (h) (West 1998). Even if the fact finder does so find, it must next consider factors in aggravation and mitigation. The death penalty can only be imposed if the fact finder concludes—unanimously, if the fact finder is a jury—that there are no mitigating factors sufficient to preclude the imposition of the death sentence. 720 ILCS 5/9-1(g), (h) (West 1998). If the fact finder does not find the State to have proven one or more of the aggravating factors beyond a reasonable doubt, or does not subsequently unanimously find that there are no mitigating factors sufficient to preclude the imposition of the death penalty, the court must

sentence the defendant to a term of imprisonment under chapter V of the Code. 720 ILCS 5/9-1(g), (h) (West 1998).

Finally, section 5-8-2(a) of the Code provides that the court

> "shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:
>
> > (1) for first degree murder, a term shall be not less than 60 years and not more than 100 years[.]" 730 ILCS 5/5-8-2(a) (West 1998).[2]

The court imposed the 80-year sentence in the instant case pursuant to section 5-8-2(a), based on its finding that the offense was exceptionally brutal and heinous. See 730 ILCS 5/5-5-3.2(b)(2) (West 1998).

In essence, the State contends that Illinois has a "unitary" sentencing scheme for first degree murder. The State urges us to read all of the statutes as a whole and conclude that any sentence the legislature has authorized to be imposed on a defendant convicted of first degree murder is part of the sentencing range.

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[2] The legislature has amended section 5-8-2 so as now to require that before an extended-term sentence may be imposed, a "trier of fact" must find "beyond a reasonable doubt" that "the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2" are present. Pub. Act 91-953, § 10, eff. February 23, 2001.

We reject this argument. A defendant commits first degree murder when he kills an individual, intending or knowing that he is likely to cause death or great bodily harm, or when he commits the killing in the attempt or commission of a felony other than second degree murder. See 720 ILCS 5/9- 1(a) (West 1998). See also Illinois Pattern Jury Instructions, Criminal, No. 7.02 (4th ed. 2000). According to the plain language of the statutes we set out above, if only these facts are proven, the sentence imposed must be between 20 and 60 years' imprisonment. See 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). For any other sentence to be imposed, be it an extended-term sentence of 60 to 100 years (730 ILCS 5/5-8-2(a)(1) (West 1998)), life imprisonment (730 ILCS 5/5-8-1(a)(1)(b), (a)(1)(c) (West 1998)), or the death penalty (720 ILCS 5/9-1(g), (h) (West 1998)), additional facts must be proven. Thus, according to the plain language of the statutes, 20 to 60 years' imprisonment is the sentencing range for first degree murder. This is the only range of sentence authorized for the basic elements of the crime.

The State's argument runs counter to the plain language of section 5-8-2(a) of the Code in another sense, as well. As previously noted, section 5-8-2(a) only requires proof of aggravating factors if the court imposes a sentence "in excess of the maximum sentence authorized by Section 5-8-1." 730 ILCS 5/5-8-2(a) (West 1998). If the "maximum sentence authorized by section 5-8-1" were life imprisonment, as the State contends, section 5-8-2(a) would seem to permit the court to impose an extended-term sentence without finding any aggravating factor—because no matter what extended-term sentence the court imposed, that sentence could not exceed life imprisonment. Reading section 5-8-1 as authorizing a maximum sentence of 60 years' imprisonment, on the other hand, allows that section and section 5-8-2(a) to operate in perfect harmony, with the 60-to-100-year extended-term range permitted pursuant to

the latter picking up exactly where the former's 20-to-60-year sentencing range leaves off. See *People v. Hopkins*, 201 Ill.2d 26, 40 (2002) ("when any statutory enhancing aggravating factor is proved to exist beyond a reasonable doubt, * * * the original sentencing range increases according to the statutory scheme" (emphasis added)).

Finally, the State's argument that the *Apprendi* "sentencing range" for a crime is any penalty authorized by statute to be imposed for that crime—regardless of what factual findings the legislature might require before higher ranges of sentence could be imposed—has recently been rejected by the Supreme Court. See *Ring v. Arizona*, 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In briefing the instant case, the State relied in large part on *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). There, the Court upheld the constitutionality of the Arizona death penalty statutes. Under Arizona law, the only two punishment alternatives for a defendant convicted of first degree murder were death or life imprisonment. Ariz.Rev.Stat. Ann. § 13-703(A) (West 2001). A death sentence could be imposed only if the court found that an aggravating circumstance existed and that there were "no mitigating circumstances sufficiently substantial to call for leniency." Ariz.Rev.Stat. Ann. § 13-703(E) (West 2001). In *Walton*, the Court upheld this scheme, rejecting the argument that a defendant was entitled to have a jury determine the existence of an aggravating circumstance. In *Apprendi*, the Court distinguished and reaffirmed *Walton*. Key to the distinction drawn by the *Apprendi* majority was the premise that the maximum sentence for first degree murder in Arizona was death. Reasoning therefrom, the Court concluded that "'once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that

maximum penalty, rather than a lesser one, ought to be imposed.'" *Apprendi*, 530 U.S. at 497, 120 S.Ct. at 2366, 147 L.Ed.2d at 459, quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n. 2, 118 S.Ct. 1219, 1237 n. 2, 140 L.Ed.2d 350, 377 n. 2 (1998) (Scalia, J., dissenting, joined by Stevens, Souter and Ginsburg, JJ.). The primary dissent in *Apprendi* labeled the majority's distinction of *Walton* "baffling," because the majority's premise was "demonstrably untrue": a defendant convicted of first degree murder in Arizona could not receive a death sentence unless the judge made the additional factual finding that a statutory aggravating factor existed. *Apprendi*, 530 U.S. at 538, 120 S.Ct. at 2388, 147 L.Ed.2d at 484 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy and Breyer, JJ.).

The Arizona Supreme Court later concluded that the *Apprendi* dissenters had construed the Arizona statutes at issue correctly. *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001). Although a defendant convicted of first degree murder could ultimately receive the death sentence, that sentence could not be imposed unless the court made a factual finding that there existed a statutory aggravating factor. *State v. Ring*, 200 Ariz. at 279, 25 P.3d at 1151.

Faced with Arizona's construction of its own statutes, the Court reconsidered its earlier conclusion that *Walton* and *Apprendi* could peacefully coexist. After briefing had concluded in the instant case, the Court overruled *Walton*. *Ring v. Arizona*, 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court concluded that *Walton* and *Apprendi* were irreconcilable, and reversed the defendant's death sentence on the grounds that the Arizona death penalty scheme was unconstitutional because it removed from the jury the determination of facts required to establish the defendant's eligibility for that sentence. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*,

530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at ___, 122 S.Ct. at 2443, 153 L.Ed.2d at 577.

One of the arguments raised in *Ring* was that the defendant was "sentenced within the range of punishment authorized by the jury verdict" because he "was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options." *Ring*, 536 U.S. at ___, 122 S.Ct. at 2440, 153 L.Ed.2d at 573. The Court rejected this argument, recalling the admonition in *Apprendi* that " 'the relevant inquiry is one not of form, but of effect.' " *Ring*, 536 U.S. at ___, 122 S.Ct. at 2440, 153 L.Ed.2d at 573, quoting *Apprendi*, 530 U.S. at 494, 120 S.Ct. at 2365, 147 L.Ed.2d at 457. A finding of an aggravating circumstance would expose the defendant to a penalty greater than that authorized by the jury's guilty verdict standing alone, the Court stated; the Arizona statutory scheme " 'authorizes a maximum penalty of death only in a formal sense.[']" *Ring*, 536 U.S. at ___, 122 S.Ct. at 2440, 153 L.Ed.2d at 573-74, quoting *Apprendi*, 530 U.S. at 541, 120 S.Ct. at 2389, 147 L.Ed.2d at 486 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy and Breyer, JJ.). The Court concluded that to endorse this argument would reduce *Apprendi* "to a 'meaningless and formalistic' rule of statutory drafting." *Ring*, 536 U.S. at ___, 122 S.Ct. at 2441, 153 L.Ed.2d at 574, quoting *Apprendi*, 530 U.S. at 541, 120 S.Ct. at 2390, 147 L.Ed.2d at 486 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy and Breyer, JJ.).

We conclude that for purposes of *Apprendi* analysis, the "sentencing range" for first degree murder in Illinois is 20 to 60 years' imprisonment. This is the only range of sentence permissible based on an ordinary jury verdict of guilt. Although there is statutory authorization for higher sentences to be imposed for this crime, any sentence longer than 60 years requires additional factual findings. See 730

ILCS 5/5-8-2(a) (West 1998) (extended-term sentence); 730 ILCS 5/5-8-1(a)(1)(b), (a)(1)(c) (West 1998) (life imprisonment); 720 ILCS 5/9-1(g), (h) (West 1998) (death penalty). According to *Apprendi*, any factual findings which take a sentence above the sentencing range must be proven to a jury beyond a reasonable doubt. In this case, the factual finding that defendant's crime was brutal and heinous was made by the circuit court, and the State was not held to the appropriate burden of proof. Accordingly, defendant's sentence cannot stand.

However, section 5-8-2(a)(1) is not facially unconstitutional. See *People v. Jackson*, 199 Ill.2d 286, 301 (2002) ("A statute is facially unconstitutional only if '"no set of circumstances exists under which the Act would be valid"'"), quoting *In re C.E.*, 161 Ill.2d 200, 210-11 (1994), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987); *Ford*, 198 Ill.2d 68 (upholding constitutionality of application of section 5-8-2(a)(1)). Accordingly, we vacate that portion of the appellate court's opinion which so held.

CONCLUSION

For the foregoing reasons, we affirm the result reached by the appellate court that the sentence in this case cannot stand. However, we vacate the appellate court's conclusion that section 5-8-2 of the Code of Corrections (730 ILCS 5/5-8-2 (West 1998)) is facially unconstitutional. The conviction entered by the circuit court is affirmed, but the sentence entered is vacated, and the cause is remanded to the circuit court for resentencing.

Appellate court judgment affirmed in part and vacated in part; circuit court judgment affirmed in part and vacated in part; cause remanded.

App. 15

[Filed May 22, 2001]

Appellate Court of Illinois,
Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Aaron D. SWIFT, Defendant-Appellant.

No. 2-99-1156.

Justice BYRNE delivered the opinion of the court:

Following a jury trial, defendant, Aaron D. Swift, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1998)). During sentencing, the trial court found that the offense of first-degree murder committed by defendant was exceptionally brutal or heinous behavior indicative of wanton cruelty and merited an extended-term sentence of 80 years' imprisonment pursuant to section 5-8-2(a) and section 5-5-3.2(b)(2) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2(a), 5-5-3.2(b)(2) (West 1998)). On appeal, defendant does not challenge the sufficiency of the evidence. Instead, he argues that the recent United States Supreme Court decision of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), mandates the reduction of his sentence. Defendant failed to raise this issue in the trial court below; however, we will review it as plain error because it affects a fundamental right. See *People v. Keene*, 296 Ill.App.3d 183, 186 (1998). For the reasons that follow, we affirm defendant's conviction, vacate his sentence, and remand the cause for resentencing.

In *Apprendi*, the Supreme Court held unconstitutional a New Jersey hate crime statute that increased the normal 5- to 10-year range of imprisonment for possession of a firearm for an unlawful purpose to a 10- to 20-year term if

the trial judge found by a preponderance of the evidence that the defendant, when committing the offense for which he was being sentenced, had acted with a racially biased purpose. *Apprendi*, 530 U.S. at ___, 120 S.Ct. at 2351, 147 L.Ed.2d at 442. The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* 530 U.S. at ___, 120 S.Ct. at 2362-63, 147 L.Ed.2d at 455. The Supreme Court instructed that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at ___, 120 S.Ct. at 2365, 147 L.Ed.2d at 457.

To sustain a charge of first-degree murder, a jury must find that the State proved all of the elements of the offense beyond a reasonable doubt. *People v. Joyner*, 317 Ill.App.3d 93, 110 (2000). Section 5-8-1(a)(1)(a) provides that the sentence for first-degree murder shall range from 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). However, under section 5-8-2(a) of the Code (730 ILCS 5/5-8-2(a) (West 1998)), the judge may impose an extended sentence exceeding the section 5-8-1(a)(1)(a) 20- to 60-year range if he finds by a preponderance of the evidence the aggravating factor that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-5-3.2(b)(2) (West 1998). Neither section 5-8- 2(a) nor section 5-5-3.2(b)(2) requires that the "exceptionally brutal and heinous" issue be submitted to a jury.

The facts upon which the trial court relied to increase defendant's murder sentence were never charged in the first-degree murder count, nor were the extended-term facts submitted to the jury in the instructions. The trial court's

finding at the sentencing hearing of exceptionally brutal and heinous behavior indicative of wanton cruelty extended the potential penalty for defendant's offense beyond the section 5-8-1(a)(1)(a) maximum of 60 years' imprisonment. According to *Apprendi*, this sentencing scheme violates the fourteenth amendment's proscription of the deprivation of liberty without due process of law and the sixth amendment's right to trial by jury under the Constitution of the United States. U.S. Const. amends. VI, XIV; *Apprendi*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348.

We therefore hold that section 5-8-2 of the Code is unconstitutional under *Apprendi* because it allows the imposition of a prison sentence of 60 to 100 years when the court determines that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty without affording defendant the right to a jury determination of whether the State proved the fact beyond a reasonable doubt. Accord *People v. Chanthaloth*, 318 Ill.App.3d 806, 816 (2001) (section 5-8-2(a)(2) unconstitutional as applied); *People v. Beachem*, 317 Ill.App.3d 693, 708 (2000) (section 5-8-2(a) unconstitutional as applied); *cf. People v. Lee*, 318 Ill.App.3d 417, 421 (2000) (section 5-8-1(a)(1)(b) unconstitutional as applied); *Joyner*, 317 Ill.App.3d at 110 (section 5-8-1(a)(1)(b) unconstitutional as applied).

The State argues that the statutory sentencing range for first-degree murder is not 20 to 60 years' imprisonment but, rather, that the range is 20 years' imprisonment up to and including death. The State concludes that, because a sentence of natural life is not an enhanced sentence or one that exceeds the statutory maximum, *Apprendi* does not apply.

The court in *Lee* rejected the same arguments that the State presents in this case. In *Lee*, as in the present case, the State relied on *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), in which the Supreme Court rejected a constitutional challenge to an Arizona

statute that authorized the trial judge, rather than a jury, to determine the existence or nonexistence of aggravating factors permitting the imposition of a death sentence for first-degree murder. *Apprendi* held that its rule did not affect the holding in *Walton* and other capital cases. *Apprendi*, 530 U.S. at ___, 120 S.Ct. at 2366, 147 L.Ed.2d at 459. The *Apprendi* court explained that those cases hold that, once a jury has found the defendant guilty of all the elements of an offense that carries as its maximum penalty the sentence of death, the judge may decide whether that maximum penalty, rather than a lesser one, ought to be imposed. Thus, the *Lee* court found a critical distinction between the statutes at issue in *Walton* and *Lee*. *Lee*, 318 Ill.App.3d at 422. The Arizona statute in *Walton* provided that the sentence for first-degree murder is either death or life imprisonment. *Ariz.Rev.Stat.* §§ 13-1105, 13-703 (1989). The *Lee* court found that the sentence of death, therefore, fell within the Arizona statutory sentencing range and the statute limited the trial court's discretion in selecting a penalty *less* than the maximum. *Lee*, 318 Ill.App.3d at 422. The *Lee* court held that, in contrast, section 5-8-1(a)(1)(a) clearly provides that the sentencing range for first-degree murder is 20 to 60 years' imprisonment and that a sentence for natural life in prison may be imposed under section 5-8-1(a)(1)(b) only if the trial court finds the existence of a certain fact, such as whether the crime was committed in a particularly brutal and heinous manner indicative of wanton cruelty. *Lee*, 318 Ill.App.3d at 422. The court concluded that the State misread the statutory scheme in proposing that a sentence of natural life in prison falls within the normal sentencing range for murder. *Lee*, 318 Ill.App.3d at 422.

We agree with the conclusion of the court in *Lee*. Clearly, section 5-8-1(a)(1)(a) provides that the sentencing range for first-degree murder is 20 to 60 years' incarceration. 730 ILCS 5/5-8-1(a)(1)(a) (West 1998). Unlike in *Walton* and its

progeny, the statutory scheme in Illinois gives the trial court the discretion to *enhance* the penalty for defendant's offense beyond the statutory maximum of 60 years' imprisonment. Because section 5-8-2(a) increases the penalty range for the crime beyond the maximum permitted by statute upon a finding by the trial court that defendant acted in a particularly brutal and heinous manner indicative of wanton cruelty, the statute unquestionably falls within the scope of *Apprendi*. See *People v. Amaya*, No. 2-00-0099, slip op. at 16 (May 10, 2001).

The State relies on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), arguing that the *Apprendi* decision does not prohibit all judicial fact finding at sentencing, even if those facts have the effect of lengthening the actual time of imprisonment. However, *McMillan* concerned the imposition of mandatory *minimum* sentences. *McMillan*, 477 U.S. at 87-88, 106 S.Ct. at 2417, 91 L.Ed.2d at 77. Here, the trial court imposed a sentence that exceeded the maximum sentence permitted under 5-8-1(a)(1)(a). We reject the State's argument.

Accordingly, we agree with defendant that his sentence of 80 years' imprisonment cannot stand. We therefore remand this cause to the trial court for resentencing on defendant's murder conviction. In light of our decision, we need not address defendant's alternative argument that the trial court failed to consider the effect of defendant's medical condition at sentencing.

For the foregoing reasons, we affirm defendant's conviction of first-degree murder, vacate the sentence of 80 years' imprisonment, and remand the cause to the trial court to conduct further hearings pursuant to section 5-5-4 of the Code (730 ILCS Ann. 5/5-5-4 (Smith-Hurd Supp.2001)).

Affirmed in part and vacated in part; cause remanded with directions.

BOWMAN and RAPP, JJ., concur.